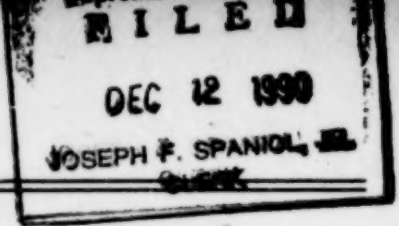


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No. 89-1322



IN THE  
**Supreme Court of the United States**

October Term, 1989

OKLAHOMA TAX COMMISSION,

*Petitioner,*

vs.

THE CITIZEN BAND OF POTAWATOMI  
INDIAN TRIBE OF OKLAHOMA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

**BRIEF FOR THE IROQUOIS BUSINESSPERSONS  
ASSOCIATION AS AN *AMICUS CURIAE*  
IN SUPPORT OF THE RESPONDENT**

JOSEPH E. ZDARSKY  
*Counsel of Record*  
GERALD T. WALSH  
ZDARSKY, SAWICKI  
& AGOSTINELLI  
404 Cathedral Place  
298 Main Street  
Buffalo, New York 14202  
(716) 855-3200  
*Attorneys for the Iroquois  
Businesspersons Association  
as amicus curiae*

Dated: December 12, 1990

## TABLE OF CONTENTS.

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|   | Page |
|---|------|
| Table of Authorities .....  | ii   |
| Interest of the Iroquois Businesspersons<br>Association .....   | 1    |
| Summary of Argument .....   | 3    |
| Argument .....  | 4    |
| I. The Court below correctly recognized tribal<br>sovereign immunity as a complete defense to<br>the State of Oklahoma's lawsuit to assess taxes<br>directly against the Respondent ..... | 4    |
| II. Absent clear congressional authority,<br>Indians are immune from state taxation and<br>states are precluded from assessing taxes<br>against Indians .....                             | 5    |
| Conclusion .....  | 8    |

## TABLE OF AUTHORITIES.

*Cases*

|  |         |
|--|---------|
| <i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976) .....  | 6       |
| <i>California State Board of Equalization v. Chemehuevi Indian Tribe</i> , 474 U.S. 9 (1986) ..... | 7       |
| <i>California v. Cabazon Band of Indians</i> , 480 U.S. 202 (1987) .....                           | 6       |
| <i>McClanahan v. State Tax Commission of Arizona</i> , 411 U.S. 164 (1973) .....                   | 6       |
| <i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973) .....                                 | 7       |
| <i>Moe v. Confederated Salish and Kootenai Tribes</i> , 425 U.S. 463 (1976) .....                  | 3,6,7   |
| <i>Montana v. Blackfeet Tribe of Indians</i> , 471 U.S. 759 (1985) .....                           | 6       |
| <i>Oklahoma Tax Commission v. Graham</i> , _____ U.S. _____, 109 S.Ct. 1519 (1989) .....           | 5       |
| <i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978) .....                                   | 3,4,5   |
| <i>United States v. United States Fidelity and Guaranty Company</i> , 309 U.S. 506 (1940) .....    | 3,4     |
| <i>Washington v. Confederated Tribes of Colville</i> , 447 U.S. 134 (1980) .....                   | 3,5,6,7 |

*Statutes*

|                         |   |
|-------------------------|---|
| 25 U.S.C. 1332(a) ..... | 6 |
| 28 U.S.C. 360(a) .....  | 6 |

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**BRIEF FOR THE IROQUOIS BUSINESSPERSONS  
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IN SUPPORT OF THE RESPONDENT**

---

**Interest of the Iroquois  
Businesspersons Association**

The Iroquois Businesspersons Association ("IBA") is an unincorporated association composed of Indians from the Six Nations of the Iroquois Confederacy, located in

New York State. Among the IBA's prime concerns are the protection of the Iroquois' right to self-determination and the opposition of state efforts to derogate tribal sovereignty. In accordance with these objectives, the IBA has a vital interest in seeking an affirmance of the lower court's decision herein prohibiting a direct tax assessment against the Respondent, Petitioner and Respondent have consented to the filing of this brief.

### Summary of Argument

The decision below raises issues of great importance for Native Americans throughout the United States who seek to further implement the expressly stated federal policies of Indian self-determination and self-sufficiency. This brief is submitted in support of the Respondent and in support of an affirmance of the Tenth Circuit Court of Appeals' decision in this case. The argument herein is limited to (i) opposition to the Petitioner's attempt to expand this Court's decisions in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980) to allow direct state taxation of an Indian tribe without express congressional authority, and (ii) opposition to the Petitioner's attempt to have this Court overrule *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *United States v. United States Fidelity and Guaranty Company*, 309 U.S. 506 (1940) regarding a tribe's sovereign immunity. We do not address the particular factual questions concerning the Respondent's status *vis-a-vis* the State of Oklahoma, except to adopt the views expressed by the Respondent.



## ARGUMENT

I. The Court below correctly recognized tribal sovereign immunity as a complete defense to the State of Oklahoma's lawsuit to assess taxes directly against the Respondent.

The Court of Appeals correctly held that the Oklahoma Tax Commission's ("Oklahoma") counterclaim for declaratory relief sustaining its right to assess taxes against The Citizen Band of Potawatomi Indian Tribe of Oklahoma (the "Tribe") is barred by sovereign immunity, Pet. Cert. App. A3-A5. Indeed, the lower court's conclusion is compelled by this Court's consistent holding that an Indian Tribe is absolutely immune from suit without its consent unless Congress unequivocally and expressly waives that sovereign immunity. See, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. United States Fidelity and Guaranty Company*, 309 U.S. 506, 512 (1940).

Oklahoma recognizes the Court's repeated affirmations of tribal sovereign immunity, but asks this Court to ignore the requirement of congressional action and "overrule" the defense of tribal sovereign immunity, Pet. Brief, p. 39. The Petitioner complains that its right to require non-Indian citizens to pay taxes for cigarettes purchased on Indian lands is worthless "... since a right without a remedy is no right at all" Pet. Brief, p. 29. Aside from the obvious remedy of proceeding directly against the non-Indian purchasers, Oklahoma's alternative is clear—take the matter up with Congress.

Since Oklahoma's counterclaim arises under state law<sup>1</sup> and Oklahoma does not assert any basis to conclude that Congress has abrogated the Tribe's sovereign immunity, the Court should not reexamine the longstanding principle that only Congress may disestablish a Tribe's sovereign immunity. *Santa Clara Pueblo v. Martinez*, *supra*, 436 U.S. at 59.

II. Absent clear congressional authority, Indians are immune from state taxation and states are precluded from assessing taxes against Indians.

Oklahoma's actions in this case are undisputed—the state issued an assessment letter to the Tribe on March 4, 1987, in the amount of \$2,691,470.70 for the sale and distribution of unstamped cigarettes on tribal lands, Pet. Cert. App., A-23. Oklahoma cites no federal authority for the proposition that a state can assess such cigarette taxes against the Tribe, but proposes that its state taxes are applicable to the Tribe's "sales transactions" under the authority of this Court's decision in *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), Pet. Brief, p. 5. Oklahoma's characterization of the tax as "applicable to the Tribe's sales transactions" is erroneous and misleading. The tax at issue in this case is not an assessment on "sales transactions", but rather a direct assessment on the Potawatomis. None of the cases relied upon by Oklahoma upheld the direct assessment of a state tax against an Indian tribe. To the contrary, this Court has consistently held that Indian tribes and individuals are immune from state taxation in the absence of unmistakably clear authority from Congress

<sup>1</sup> See, *Oklahoma Tax Commission v. Graham*, \_\_\_\_\_ U.S. \_\_\_\_\_, 109 S.Ct. 1519 (1989), where the Court held that Oklahoma's suit against the Chickasaw Nation for unpaid cigarette taxes arose under state law and could not be removed to federal court.

to impose state taxes on Indians. See, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973).

As the Court recognized in *Montana v. Blackfeet Tribe*, *supra*, any analysis of a state's attempt to tax Indians begins with the notion that "Indian tribes and individuals generally are exempt from state taxation within their own territory." 471 U.S. at 764. The next step is to determine whether Congress has expressly authorized the imposition of the state tax on Indians:

In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.

*Montana v. Blackfeet Tribe*, *supra*, 471 U.S. at 765.

In this case, Oklahoma does not cite any authority for the proposition that it can lawfully assess its cigarette tax against the Tribe. Instead, by casting its argument in terms of a tax on the "sales transaction", Oklahoma attempts to extend the Court's "minimal burdens" analysis developed in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980) to provide for direct state taxation of an Indian tribe without express congressional authority.<sup>2</sup>

<sup>2</sup> Although not applicable in Oklahoma, Public Law 280 [25 U.S.C. 1332(a), 28 U.S.C. 360(a)], which permits certain states to assume jurisdiction over "civil causes of action" in Indian country to which Indians are parties, does not confer authority on those states to extend its full range of regulatory authority, including taxation, over Indians on Indian reservations. See, *Bryan v. Itasca County*, 426 U.S. 373 (1976); *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987).

In *Moe v. Confederated Salish and Kootenai Tribes*, *supra*, the Court held that where the incidence of a tax falls upon the non-Indian purchaser, the "minimal burden" of collecting the tax from the non-Indian purchaser, who bore the liability for the tax, was not a tax at all on the Indian, and, therefore, the requirement of express congressional authorization to tax Indians did not come into play:

The state's requirement that the Indian tribe collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax. Since this burden is not, strictly speaking, a tax at all, it is not governed by the language of *Mescalero* [*Apache Tribe v. Jones*, 411 U.S. 145 (1973)] at 475, dealing with the special area of state taxation. *Moe v. Confederated Tribes*, *supra*, 425 U.S. at 483 [emphasis added].

Whatever enforcement rights the Court intended to apply in *Moe* it is clear that direct assessment of the tax against the tribe was not one of them. Similarly, neither *Washington v. Confederated Tribes of Colville*, *supra*, cited by Oklahoma, nor *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1986), upheld the direct assessment of a state tax against Indians. In this case, since Oklahoma directly assessed the tax against the Tribe, without authority from Congress, the assessment cannot be sustained.

**Conclusion**

The opinion of the Tenth Circuit Court of Appeals should be affirmed.

Dated: December 12, 1990

Respectfully submitted,

**JOSEPH E. ZDARSKY**

*Counsel of Record*

**GERALD T. WALSH**

**ZDARSKY, SAWICKI**

**& AGOSTINELLI**

**404 Cathedral Place**

**298 Main Street**

**Buffalo, New York 14202**

**(716) 855-3200**

*Attorneys for the Iroquois*

*Businesspersons Association*

*as amicus curiae*